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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Hershel M. Taxey, as the personal  
representative of the Estate of Ayako  
Watanabe,

Plaintiff,

v.

Maricopa County, a political body,

Defendant.

No. CIV 00-451-PHX-EHC

**ORDER**

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Pending before the Court is Plaintiff's Motion in Limine #1<sup>1</sup> [Dkt. 71], and Defendant's Motion for Summary Judgment.<sup>2</sup> [Dkt. 72].

**I. Facts**

On August 18, 1997, Ayako Watanabe applied for the position of Accountant I with Maricopa County in the finance division of the Maricopa County Sheriff's Office. [Dkt. 21 at 3, ¶10]. On September 11, 1997, Sergeant Paul J. Russo sent Watanabe a letter stating that she had not been selected for the position of Accountant I. [Dkt. 73, Exh. 1, bates no. 325]. Watanabe received this notice approximately one week later. [Dkt. 79, Exh. B at p.64].

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<sup>1</sup> Defendant's Response to Plaintiff's Motion in Limine #1 is at docket 74.

<sup>2</sup> Plaintiff's Response to Defendant's Motion for Summary Judgment is at docket 78, and Defendant's Reply is at docket 82.

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1 On September 24, 1997, Watanabe filed a Charge of Discrimination with the Arizona  
2 Civil Rights Division and the Equal Employment Opportunity Commission ("EEOC") in  
3 which she alleged age discrimination under the Age Discrimination in Employment Act  
4 ("ADEA"). [Dkt. 73, Exh. 2, bates no. 002]. In this Charge of Discrimination, Watanabe  
5 did not allege that Maricopa County had discriminated against her on the basis of her  
6 national origin in violation of Title VII. [Id.].

7 The EEOC requested Maricopa County to provide them with its position statement  
8 as to Watanabe's allegation by October 22, 1997. [Dkt. 73, Exh. 2, bates no. 001]. On  
9 February 12, 1998, the EEOC sent a letter to Maricopa County which notified it that it was  
10 overdue in submitting its position statement as to Watanabe's allegation. [Dkt. 79, Exh. C].  
11 On February 20, 1998, Maricopa County submitted its position statement to the EEOC,  
12 denying that it had discriminated against Watanabe on the basis of her age in violation of the  
13 ADEA. [Dkt. 73, Exh. 3]. Maricopa County stated that Watanabe "was not hired because  
14 the individuals selected for the accountant I positions were rated higher during the interview  
15 process." [Id.]. Maricopa County also stated:

16 [Watanabe] was not one of the five highest ranked applicants and therefore  
17 was not selected to continue processing. [Watanabe] received a poor rating  
18 in the interview due to her lack of English language proficiency. She was not  
19 able to communicate her answers to the questions that were asked. These poor  
20 communication skills would have hindered her ability to perform some of the  
21 essential functions of the job of Accountant I, which require the ability to  
22 communicate in person and by phone with employees, supervisors, and  
23 division commanders in order to convey information and answer questions.

24 [Id.].

25 On August 27, 1998, the EEOC notified Watanabe's husband, Hershel M. Taxey, that  
26 Watanabe's EEOC charge needed to be amended to include an allegation of national origin  
27 discrimination, and that after the amendment was prepared by the EEOC, it would be mailed  
28 to Watanabe for her to initial. [Dkt. 79, Exh. E]. On September 2, 1998, Watanabe's Charge  
of Discrimination was amended to include the allegation of national origin discrimination.  
[Dkt. 73, Exh. 4, bates no. 011].

1 On June 25, 1999, the EEOC issued a Determination as to Watanabe's charges. The  
2 EEOC found "reasonable cause to believe that [Watanabe] was denied hire because of her  
3 national origin, specifically, her Japanese accent," but made no finding on Watanabe's claim  
4 of age discrimination. [Dkt. 71, Exh. B].

5 On October 2, 2000, Watanabe filed an Amended Complaint against Maricopa  
6 County alleging that it discriminated against her on the basis of her national origin. [Dkt.  
7 21].<sup>3</sup>

## 8 9 **II. Plaintiff's Motion in Limine**

10 Plaintiff filed a Motion in Limine #1 for an Order "permitting the introduction of  
11 documentary evidence and/or testimony concerning the Equal Employment Opportunity  
12 Commission's ("EEOC") investigation and disposition of Watanabe's Charge of  
13 Discrimination" during both the upcoming trial and in response to Maricopa County's  
14 Motion for Summary Judgment. [Dkt. 71].

15 Maricopa County filed a Response to Plaintiff's Motion in Limine #1 stating that it  
16 does not object to Plaintiff's use of the June 25, 1999 reasonable cause finding by the EEOC  
17 in response to Maricopa County's Motion for Summary Judgment or at trial; however, it  
18 objects to the admissibility of testimony concerning the EEOC's investigation into  
19 Watanabe's charge of discrimination because the investigator has not been deposed. [Dkt.  
20 74].

21 The Court will grant Plaintiff's Motion in Limine #1 to the extent that Plaintiff may  
22 use the June 25, 1999 reasonable cause finding by the EEOC in its Response to Maricopa  
23 County's Motion for Summary Judgment and at trial.

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26 <sup>3</sup> On March 30, 2001, counsel for Watanabe filed a Notification of Death of Ayako  
27 Watanabe. [Dkt. 46]. On June 14, 2001, the parties filed a stipulated motion that Watanabe's  
28 husband, Hershel M. Taxey, as personal representative of the estate of Ayako Watanabe, be  
substituted as Plaintiff. [Dkt. 55]. The Court granted the parties' stipulated motion for substitution  
on June 20, 2001. [Dkt. 60].

1 **III. Summary Judgment Standard**

2 Summary judgment may be granted if the movant shows "there is no genuine issue  
3 as to any material fact and that the moving party is entitled to a judgment as a matter of law."  
4 Fed.R.Civ.P. 56 (c). Substantive law determines which facts are material. See Anderson  
5 v. Liberty Lobby Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). "Only disputes over  
6 facts that might affect the outcome of the suit under the governing law will properly preclude  
7 the entry of summary judgment." Id.

8 A dispute about a material fact is genuine if "the evidence is such that a reasonable  
9 jury could return a verdict for the nonmoving party." Id. There is no issue for trial unless  
10 there is sufficient evidence favoring the nonmoving party. "If the evidence is merely  
11 colorable or is not significantly probative, summary judgment may be granted." Id. at 249-  
12 50, 106 S. Ct. at 2511 (citations omitted). In a civil case, the question is:

13 whether a fair-minded jury could return a verdict for the plaintiff on the  
14 evidence presented. The mere existence of a scintilla of evidence in support  
15 of the plaintiff's position will be insufficient; there must be evidence on which  
16 the jury could reasonably find for the plaintiff.

17 Id. at 252, 106 S. Ct. at 2512.

18 A party seeking summary judgment bears the initial burden of informing the court of  
19 the basis for its motion and identifying those portions of the pleadings and discovery  
20 responses which it believes demonstrate the absence of a genuine issue of material fact. See  
21 Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). The moving  
22 party that has the burden of proof on the issue at trial must establish all of the essential  
23 elements of the claim or defense for the court to find that the moving party is entitled to  
24 judgment as a matter of law. See Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5<sup>th</sup> Cir.  
25 1986); Calderone v. United States, 799 F.2d 254, 259 (6<sup>th</sup> Cir. 1986). However, the moving  
26 party need not disprove matters on which the opponent has the burden of proof at trial. See  
27 Catrett, 477 U.S. at 323, 106 S. Ct. at 2553. "The evidence of the non-movant is to be  
28 believed and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at  
255, 106 S. Ct. at 2513.

1 **IV. Defendant Maricopa County's Motion for Summary Judgment**

2 Maricopa County argues it is entitled to summary judgment on Plaintiff's claims  
3 because Watanabe failed to file her charge of national origin discrimination with the EEOC  
4 within the 300 day statutory limitation period, and her charge of national origin  
5 discrimination does not relate back to her original charge of age discrimination which was  
6 filed with the EEOC on September 24, 1997. [Dkt. 72].

7 Title VII requires that a plaintiff timely file charges of discrimination with the EEOC  
8 and receive a right to sue letter from the EEOC prior to bringing a Title VII claim in federal  
9 court. See 42 U.S.C. § 2000e-5(e). Specifically, Title VII mandates that a plaintiff file a  
10 charge of discrimination with the EEOC within 180 days of the alleged unlawful  
11 employment practice, unless the plaintiff initially institutes proceedings with a state or local  
12 agency, in which case the time limit for filing a charge with the EEOC is extended to 300  
13 days. See 42 U.S.C. § 2000e-5(e)(1); Santa Maria v. Pacific Bell, 202 F.3d 1170, 1176 (9<sup>th</sup>  
14 Cir. 2000).

15 Relation back

16 Certain amendments to a charge of discrimination may relate back to the filing date  
17 of the original charge of discrimination and, therefore, be considered timely even if the  
18 amended charge takes place after the limitations period. 29 C.F.R. §1601.12(b); see Simms  
19 v. Oklahoma, 165 F.3d 1321, 1325 (10<sup>th</sup> Cir. 1999). In order for an amended charge of  
20 discrimination to relate back, it must 1) cure technical defects or omissions, 2) clarify or  
21 amplify allegations made in the original charge; or 3) allege additional Title VII violations  
22 "related to or growing out of the subject matter of the original charge." 29 C.F.R.  
23 §1601.12(b); Simms, 165 F.3d at 1325.

24 Watanabe originally filed her age discrimination charge on September 24, 1997. She  
25 did not amend it to add the national origin discrimination claim until September 2, 1998,  
26 well after the 300 day time limit. Plaintiff argues that although Watanabe's national origin  
27 discrimination charge was filed after the limitations period, it relates back to Watanabe's  
28 original charge of age discrimination. [Dkt. 79].

1 As the Ninth Circuit has noted, "Title VII and ADEA claims arise from entirely  
2 distinct statutory schemes." Pejic v. Hughes Helicopter, Inc., 840 F.2d 667, 675 (9<sup>th</sup> Cir.  
3 1988). Watanabe's original charge alleging age discrimination contains no hint of national  
4 origin discrimination. Furthermore, Watanabe's amended charge of national origin  
5 discrimination fails to clarify or amplify allegations made in the original charge, and does  
6 not allege additional Title VII violations related to or growing out of the subject matter of  
7 the original charge, age discrimination. Thus, Watanabe's amended charge of national origin  
8 discrimination does not relate back, and is therefore untimely. See *id.*, Rodriguez v.  
9 Airborne Express, 265 F.3d 890, 898-900 (9<sup>th</sup> Cir. 2001).

10 Equitable tolling

11 Although Watanabe's national origin discrimination claim does not relate back to her  
12 age discrimination claim, equitable tolling may be applied to extend the limitations period  
13 for Watanabe to file her national origin discrimination claim.

14 "In a Title VII suit, failure to file an EEOC charge within the prescribed 300-day  
15 period is not a jurisdictional bar, but it is treated as a violation of a statute of limitations,  
16 complete with whatever defenses are available to such a violation, such as equitable tolling  
17 and estoppel." Santa Maria, 202 F.3d at 1176. The period within which the plaintiff must  
18 file the charge begins to run on the date the employee received notice of the employment  
19 decision. See Aronsen v. Crown Zellerbach, 662 F.2d 584, 593 (9<sup>th</sup> Cir. 1981) ("[I]n Title  
20 VII . . . suits, inquiry for purposes of determining when the limitations period begins to run  
21 must center on the date when the employee has notice of the unlawful act."). However,  
22 courts have recognized circumstances warranting the equitable tolling of this limitation  
23 period. Equitable tolling focuses on whether there was excusable delay by the plaintiff. See  
24 Santa Maria, 202 F.3d at 1178.

25 In Reeb v. Economic Opportunity Atlanta, Inc., the plaintiff was notified by a letter  
26 that her employment contract would not be renewed because of a "limitation of funds." 516  
27 F.2d 924, 926 (5<sup>th</sup> Cir. 1975). The letter was dated September 24, 1969, and indicated that  
28 the plaintiff's termination would be effective immediately. Initially, the plaintiff accepted

1 the rationale for her termination. However, in the spring of 1970, the plaintiff, for the first  
2 time, learned that her position had subsequently been refilled on November 10, 1969, by an  
3 allegedly less qualified male employee. When the plaintiff learned of her replacement, she  
4 immediately file charges of sex discrimination with the EEOC. *Id.*

5 At the time the plaintiff learned her position had been refilled, the time period for  
6 filing a charge of employment discrimination with the EEOC had already passed. The Fifth  
7 Circuit held, though, that the time period in which to file a charge of employment  
8 discrimination with the EEOC did not begin to run "until the facts that would support a  
9 charge of discrimination under Title VII were apparent or should have been apparent to a  
10 person with a reasonably prudent regard for his rights similarly situated to the plaintiff. *Id.*  
11 at 931.

12 In Santa Maria v. Pacific Bell, 202 F.3d 1170 (9<sup>th</sup> Cir. 2000) the Ninth Circuit  
13 consider a situation similar to that in Reeb. However, the plaintiff in Santa Maria knew or  
14 reasonably should have known of the existence of a possible discrimination claim within the  
15 time limit for filing a charge of discrimination. The Ninth Circuit held that equitable tolling  
16 will not excuse the untimely filing of an EEOC charge by a plaintiff who, within the time  
17 limit, knew or should have known of the existence of a possible discrimination claim. *Id.*  
18 at 1179.

19 Here, Watanabe received a letter on September 18, 1997, from Maricopa County  
20 informing her that she was not selected for the position of Accountant I. [Dkt. 83, Exh. 5,  
21 §3]. On September 24, 1997, Watanabe filed a Charge of Discrimination with the Arizona  
22 Civil Rights Division and EEOC alleging age discrimination. [Dkt. 73, Exh. 2, bates no.  
23 002]. On February 20, 1998 Maricopa County filed its position statement with the EEOC  
24 in which it stated that Watanabe was not selected for the position of Accountant I because  
25 she "received a poor rating in the interview due to her lack of English proficiency." [Dkt. 73,  
26 Exh. 3].  
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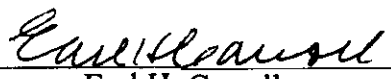
1       There is nothing in the record to indicate that Watanabe received a copy of Maricopa  
2 County's position statement after it was filed in February 1998.<sup>4</sup> On August 27, 1998, after  
3 the 300 day limitation period had passed, the EEOC notified Watanabe's husband that  
4 Watanabe's EEOC charge needed to be amended to include an allegation of national origin  
5 discrimination. [Dkt. 79, Exh. E]. According to Watanabe, she did not learn of her national  
6 origin discrimination claim until the EEOC told her about it. [Dkt. 73, Deposition of Ayako  
7 Watanabe, p.69]. Viewing the evidence in the light most favorable to Plaintiff, there is a  
8 genuine issue of material fact as to whether Watanabe knew or could reasonably have been  
9 expected to learn of the facts that would support her charge of national origin discrimination  
10 within the 300 day limitation period, and thus, whether the 300 day limitation period should  
11 be equitably tolled. The Court will therefore deny Maricopa County's motion for summary  
12 judgment.

13 Accordingly,

14       **IT IS ORDERED** that Plaintiff's Motion in Limine [Dkt. 71] is **GRANTED** to the  
15 extent that Plaintiff may use the June 25, 1999 reasonable cause finding by the EEOC in its  
16 Response to Defendant's Motion for Summary Judgment and at trial.

17       **IT IS FURTHER ORDERED** that Defendant's Motion for Summary Judgment  
18 [Dkt. 72] is **DENIED**.

19       Dated this 28 day of August, 2002.

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22 Earl H. Carroll  
23 United States District Judge  
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27       <sup>4</sup> The Court also notes although Maricopa County was ordered to file its position statement  
28 with the EEOC by October 22, 1997, it was not filed until February 10, 1998, almost four months  
later. [Dkt. 73, Exh. 2, bates no. 001; Dkt. 79, Exh. C; Dkt. 73, Exh. 3].